CHEW CHEE SUN

v.

ORIENTAL BANK BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI JC
[CIVIL SUIT NO: S3-22-143 OF 1994]
15 AUGUST 1996

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Principles applicable - Effect of amendment - Withdrawal of earlier admission of plaintiff's allegation - Whether should be allowed - Rules of the High Court 1980, O. 20 r. 5*

LAND LAW: *Charge - Equitable charge - Whether prohibited by law - National Land Code 1965*

The 1st defendant ('the bank') was the assignee of a certain property ('Lot 5.47') of which the plaintiff was the legal owner. Lot 5.47 had been assigned by the plaintiff to the bank to secure a term loan of RM100,000 and overdraft facility of RM175,000 ('the facilities') to a third party ('the borrower'). The plaintiff and the 4th defendant, as the legal owners of another piece of property ('Lot 5.48'), had also assigned Lot 5.48 in favour of the bank to secure the said facilities. The third party defaulted on the facilities and 1st defendant caused Lots 5.47 and 5.48 to be auctioned. The 2nd and 3rd defendants were the successful bidders at the auction. However, when the time came for the balance of the purchase price to be paid, the 2nd and 3rd defendants failed to pay up and 1st defendant offered them an extension of time. The plaintiff and 4th defendant averred that 1st defendant's failure to consult them before making the offer of an extension of time was in breach of contract and/or duty of care to them. The plaintiff claimed, *inter alia,* for declarations that the contracts of sale for Lots 5.47 and 5.48 were rescinded, and for damages.

The plaintiff, in his amended statement of claim, averred that there was an equitable charge in favour of 1st defendant over Lots 5.47 and 5.48. 1st defendant in its defence, admitted that there was an equitable charge. About two years later, the bank applied to amend its defence under O. 20 r. 5 of the Rules of the High Court 1980 on the ground that the plaintiff's averment of an equitable charge was wrong in law as there was no such thing as an equitable charge under the National Land Code 1965 ('Code') and that the amendment was necessary to properly reflect 1st defendant's defence to the plaintiff's amended statement of claim. The plaintiff pointed out that the original defence had in fact been made in direct response to the amended

statement of claim and that the effect of the proposed amendment would be to withdraw 1st defendant's earlier admission that there was an equitable charge. The 1st defendant's application was dismissed by the senior assistant registrar and its appeal to the judge in chambers was also dismissed. The 1st defendant further appealed.

Held:

[1] Where an amendment would allow the true issue to be determined, it must be allowed, as the primary concern of the court is to determine the issue in controversy and not penalise the parties for errors and defects in documents. The three principles to guide the court are that there must be *bona fides* on the applicant's part, that no prejudice would be caused to the other party and the amendment is not such as to turn a suit of one character into a suit of another and inconsistent character.

[2] In this case, the proposed amendment could jeopardise the plaintiff's case as it related to the averment of an equitable charge which 1st defendant had already admitted in its defence and which it now sought to avoid.

[3] There were signs of *mala fides* on 1st defendant part as it was manifest that the defence had been made in direct response to the amended statement of claim and that the proposed amendment was not in fact necessitated by any amendment to the statement of claim.

[4] The courts have resorted to equitable principles and consistently held that an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable right in favour of the creditor although no charge or lien within the Code is executed or created. There is nothing in the Code which prohibits the creation of equitable charges or liens and the Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charges and liens are permissible under our land law.

[Appeal dismissed.]

Cases referred to:

Clarapede v. Commercial Union Association [1832] 32 WR 262 ***(refd)***
Clough and Rogers v. Frog [1974] 4 Australian Law Reports 615 ***(refd)***
GL Baker Ltd v. Medway Building Fund Supplies Ltd [1958] 1 WLR 1216 ***(refd)***
Hj Abdul Rahman & Anor v. Mohamad Hassan [1917] AC 209 ***(foll)***
Hong Leong Finance Ltd v. Famco (S) Pte Ltd & Ors [1992] 2 SLR 1108 ***(refd)***
Ketterman v. Hansel Properties [1987] AC 189 ***(foll)***
Looi Guan Kwang v. Low Lean Bok [1938] MLJ 35 ***(foll)***
Mahadevan s/o Mahalingam v. Manilal and Sons (M) Sdn Bhd [1984] 1 CLJ 286 ***(foll)***

Syarikat Nomasani Sdn Bhd v. Farouk Mohd Haniff [1991] 3 CLJ 2112 ***(refd)***
Tidesly v. Harper [1876] 10 Ch D 393 ***(foll)***
Wright Norman & Anor v. Overseas Chinese Banking Corp Ltd [1994] 1 SLR ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 20 r. 5

Other source referred to:
Pleading and Practice, Odgers

For the plaintiff - David Mathew; M/s Cheah Teh & Su
For the defendant - Vijaykumar (Geetha, chambering student with him); M/s Albar Zulkifly & Yap

Reported by Anne Khoo

JUDGMENT

Zainun Ali JC:

This is an appeal from the dismissal of an application made by the 1st defendant to amend his statement of defence under O. 20 r. 5 Rules of the High Court 1980. The facts as are found in this matter are as set below:

By an amended statement of claim dated 19 March 1994 it was averred that there was an agreement on 30 June 1979 (hereinafter referred to as the 'SPA') between Garden City Development Berhad (hereinafter called the 'Developer') and one Teng Hua Chua wherein the Developer agreed to sell and Teng agreed to purchase the parcel of business premises known as Lot 5.47, 5th Floor Wisma Central, Jalan Ampang (hereinafter called 'Lot 5.47') upon terms and conditions contained therein.

Subsequently a deed of assignment was made on 12 September 1980 between Teng and one Kam Kiew Kee (hereinafter referred to as 'Ah Kee') where Teng assigned absolutely to Ah Kee all his rights, title and interest in and to Lot 5.47 under the SPA of 30 June 1979 together with the entire benefit thereof for the consideration and upon terms and conditions contained therein.

By a deed of assignment dated 16 March 1992 made between Ah Kee and the plaintiff, Ah Kee assigned absolutely to the plaintiff all his rights, title and interest in and to Lot 5.47 under the SPA of 30 June 1979 together with the entire benefit for the consideration and upon the terms and conditions thereon contained.

The plaintiff had effected full payment to Ah Kee and to the Developer all payments due under the SPA of 30 June 1979 are under the deed of assignment of 10 March 1982.

The Developer also made an agreement on 11 December 1978 with the plaintiff and the 4th defendant when the Developer sold and the plaintiff and 4th defendant purchased all that parcel of business premises known as Lot 5.48, 5th Floor Wisma Central, Jalan Ampang.

By way of two separate agreements in writing dated 22 August 1986, the plaintiff averred that he caused an equitable charge in the form of loan agreements cum assignments to be created over Lot 5.47 in favour of the 1st defendant in consideration for a term loan of RM100,000 and an overdraft facility of RM175,000 to be granted to C.S. Chew Chartered Architects and Town Planners of Suite 5.48, 5th Floor Wisma Central, Jalan Ampang (hereinafter called 'the borrower').

There were two further agreements dated 22 August 1986 whereby the plaintiff and the 4th defendant caused an equitable charge also in the form of loan agreements cum assignment to be created over Lot 5.48 in favour of the 1st defendant in consideration for the said term loan of RM100,000 and the said overdraft facility of RM175,000 to be granted to the borrower upon the terms and conditions contained therein. The normal terms and conditions of the loan agreement cum assignment follows.

The plaintiff claims that in purported exercise of its rights under the loan agreements cum assignment, this 1st defendant caused Lots 5.47 and 5.48 to be jointly put up for sale by public auction.

The 2nd and 3rd defendants successfully bidded for the said lots upon the terms and conditions contained therein. The last day for the 2nd and 3rd defendants to effect payment of the balance purchase price was on 11 January 1993. However, the 2nd and 3rd defendants failed to do this, and the 1st defendant offered an extension of time of three months for the 2nd and 3rd defendants to pay up.

The plaintiff and 4th defendant thus averred that they were not consulted as to the extension of time and so claimed that the 1st defendant is in breach of contract and/or duty of care to the plaintiff and 4th defendant.

The plaintiff asked for several declarations in his statement of claim, i*nter alia*, that the 2nd and 3rd defendants have no right or interests in Lots 5.47 and 5.48, that the contract of sales of Lots 5.47 and 5.48 to the 2nd and 3rd defendants have been rescinded, that the 2nd and 3rd defendants have no rights or interests to Lots 5.47 and 5.48;

That the 2nd and 3rd defendants are liable to the plaintiff and/or 4th defendant for the costs of any resale of Lots 5.47 and 5.48 together with deficiency in price which may result in a resale. That the plaintiff and the 4th defendant do stand credit with the sum RM36,600 as at 17 July 1993 less expenses for the abortion sale of Lots 5.47 and 5.48;

That damages against the 1st defendant to be assessed, and costs and any reliefs the court deem fit. The 1st defendant filed his statement of defence on 9 May 1994, wherein among other things, the 1st defendant admitted on the plaintiff's averment with regard to there being created **an equitable charge** on the property in favour of the 1st defendant.

On 11 May 1994, the 1st defendant applied to strike out plaintiff's amended statement of claim under O. 18 r. 19 Rules of the High Court 1980 on the ground that it prejudices, embarrass or delay the fair trial of the action or it is an abuse of the process of the court. This was supported by the affidavit of Leong Chin Soon who is the Manager of the 1st defendant.

The affidavit states that the plaintiff's action is misconceived and in the alternative, that he has no *locus standi*.

On 17 April 1996 the 1st defendant filed an application to amend his statement of defence on the ground that the amendment is necessitated by the amendment made to plaintiff's statement of claim dated 11 April 1994 and that the proposed amendment is necessary to properly reflect the 1st defendant's defence on the plaintiff's claim. The 1st defendant also averred that the proposed amendment will not prejudice the plaintiff in any way.

The 1st defendant averred that para. 7(i) and (ii) of the plaintiff's statement of claim with regard to there being created an equitable charge is wrong in law.

The plaintiff responded on 30 April 1996 wherein it was averred that the 1st defendant's statement of defence was made in direct response to the **amended** statement of claim, where the amended statement of claim was served on the defendant.

It is thus a fallacy to say that the proposed amendment to the statement of defence was necessitated by the amended statement of claim. The plaintiff claims that the effect of the proposed amendment to the statement of defence would be to withdraw an admission that there is an equitable charge on the property. The plaintiff avers that the proposed amendment to the statement of defence is therefore misconceived and an abuse of court process.

The 1st defendant's application before the Senior Assistant Registrar was dismissed on 15 June 1996 and it came up for appeal to the judge in chambers on 15 August 1996 to which this court also dismissed it with costs.

The plaintiff's averment that an equitable charge is created over the property is thus pivotal to this application.

Banal as it might seem, it is still useful to lay down the general principles with regard to applications of this nature made under O. 20 r. 5 Rules of the High Court 1980.

How stands the authorities on this point? Odgers on *Pleadings and Practise* states that:

> As a general rule either party is allowed to make any such amendment as is reasonably necessary for the due presentation of his case on payment of the costs of an occasioned by the amendment provided there has been no undue delay on his part ... and provided also the amendment will not injure or affect any vested right of his opponent.

Then in *Clarapede v. Commercial Union Association* [1832] 32 WR 262, Brett MR says:

> However negligent or careless might have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but if the amendment will put them into such a position that they may be injured it ought not to be made."

In *G.L. Baker Ltd. v. Medway Building Fund Supplies Ltd.* [1958] 1 WLR 1216 where *Tidesly v. Harper* [1876] 10 Ch.D 393, the *locus classcus* on this question was considered, it was held that although the Court of Appeal should always be slow to interfere with the Judge's discretion, in such a case, where the amendment would have allowed the true issue to be determined, it must be allowed.

In *Looi Guan Kwang v. Low Lean Bok* [1938] MLJ 35, Aitken J succintly stated that in this regard, three principles to guide the court should be:

(a) there is *bona fides* on the part of the applicant's;

(b) the amendments cause no prejudice to the other side which cannot be compensated with costs;

(c) they are not such as to turn a suit of one character into a suit of another and inconsistent character.

It might not be pedantic to state that the primary consideration for the court is to determine the real question in controversy between the parties rather than to penalise them for errors and defects in documents.

Perhaps the observation of Lord Griffith in *Ketterman v. Hansel Properties* [1987] AC 189 best illustrates the rationale of this rule where His Lordship states that:

> ... whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies ...

In the present application, this court finds that what the defendant sets out to do my *jeopardise* the plaintiff's case. It would appear that the defendant has failed to display *altruistic motives* or shown innocuous intentions in his application.

The affidavit in support of the defendant's application exascerbates the problem, since it is merely a bald assertion of the non-existence of an equitable charge under the National Land Code and which the 1st defendant claims is therefore wrong in law. The 1st defendant's affidavit in support is also bereft of any statement to show that the plaintiff would not be prejudiced by this application.

If there is a possibility or any hint of prejudice occasioned to the plaintiff, then this court should be circumspect before making any decision or before allowing such an application. As indicated in the case of *Clough and Rogers v. Frog* [1974] 4 Australian Law Reports 615, it was held that although the court in that case did allow amendment to the statement of defence, it was observed that there was possibility of prejudice because there existed the chance that *Frog* had a cause of action against the nominal defendant.

In *Hong Leong Finance Ltd. v. Famco (S) Pte. Ltd. & Others* [1992] 2 SLR 1108, though of persuasive authority, an application to amend was made by the 7th defendant after the close of the plaintiff's case. The court affirmed the well-established principle that if amendments are necessary to define the issue in dispute, they should be allowed **unless** injustice would be caused to the opposing party.

The learned judge did not believe in this case that the proposed amendment should have afforded a "real and viable" defence.

In *Syarikat Nomasani Sdn. Bhd. v. Farouk Mohd Haniff* [1991] 3 CLJ 2112, Mr. Justice Lim Beng Choon was of the view that if the proposed amendment is inconsistent or of no use, the court should disallow such amendment. In *Syarikat Nomasani*, the amendment sought for also relates to a point of law, as in the present application.

The defendant's proposed amendment relates only in statement on 'equitable charge' as averred in the statement of claim, to which the 1st defendant had already admitted in his defence and to which he now wishes to avoid.

I am constrained to find evidence of *bona fides* on the part of the 1st defendant in this regard. The 1st defendant states on oath that the proposed amendment was in response to the amended statement of claim. It is inconceivable that the 1st defendant should have the temerity now to make a sworn statement to this effect, since it is manifest that the statement of defence was made in direct response to the amended statement of claim.

Thus the stirrings of *mala fides* seems to show signs here already.

The second point raised by the 1st defendant's counsel was that "the amendment was necessitated because there is no such thing as an equitable charge under the National Land Code."

The plaintiff's vigorous objection to this contention is probably motivated by an apprehension that his claim would be prejudiced, since in effect the 1st defendant's action would amount to a withdrawal of the 1st defendant's admission made in his statement of defence.

I of course, will make no comment on the merits or otherwise of the 1st defendant's claim. This claim in fact, will have to await trial.

However to deny as I did, the 1st defendant their application, would necessitate an examination on how the Court's discretion was exercised.

In that regard, the issue being one of 'equitable charge', I can do no better than to cite the authority found in *Mahadevan s/o Mahalingam v. Manilal and Sons (M) Sdn. Bhd.* [1984] 1 CLJ 286 where Salleh Abas CJ, as then was, observed that:

> ... Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, i.e. ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens System ... in which the mortgagor retains the legal ownership whilst the mortgagee acquire a statutory right to enforce his security. For the purpose of avoiding confusion,

> our National land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus when s. 21(i) of our Limitation Act speaks of a 'mortgage' it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code (see *Hj. Abdul Rahman & Anor. v. Mohamad Hassan* [1917] AC 209 at 217). That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an **equitable charge** or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.

The decision of the Privy Council in *Hj. Abdul Rahim v. Mohamad Hassan supra*, certainly does not prevent the creation of an equitable charge. The land is charged to the creditor and upon repayment, the land would be transferred back to the debtor and is as good as a contract.

The right so created was not a legal right in the land but only a contractual right.

Examination of court decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the previous National Land Code is executed or created.

There is no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charges and liens are permissible under our land law.

Thus based on the authority above and the succint pronouncement made by His Lordship Salleh Abbas CJ (as he then was), it is apparent that the defendant is misconceived in his contention. What is crucial here is that an equitable charge would allow plaintiff to retain legal ownership whilst the defendant acquires a statutory right only, to enforce his security. This is presumably the plaintiff's trump card.

After having admitted this in his defence, it would, to my mind prejudice the plaintiff should I allow the 1st defendant's application since I believe there is force in the plaintiff's submission that there is *mala fides* and that more importantly, he would have a fair chance in his claim which in any event, the issues of which can be fully canvassed at the trial.

Thus, although I would go along with the Court's observation in *Wright Norman & another v. Overseas Chinese Banking Corp. Ltd.* [1994] 1 SLR that pleadings must not be used as a means to punish a party for his errors

or the errors of his solicitors, it seems compelling to subscribe to Lord Griffith's observation in *Ketterman v. Hansel Properties*, *supra* that:

> Justice would be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

Thus in the circumstances, I believe it stands to reason that the 1st defendant's application should be disallowed because at the end of the day, the most important question which the court must ask itself is, are the ends of justice served by allowing the proposed amendment?

I think not, and accordingly dismiss this application with costs.